

71038-9

RECEIVED

APR 28 2014

ORIGINAL

Clerk
71038-9

ATTORNEY GENERAL OFFICE
SEATTLE

COURT OF APPEALS NO. 71038-9-I

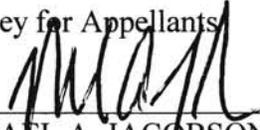
WASHINGTON STATE COURT OF APPEALS
DIVISION ONE AT SEATTLE

MICHAEL AND MELODY GIBSON, APPELLANTS
V
STATE OF WASHINGTON, EMPLOYMENT SECURITY DIVISION,
RESPONDENT

APPELLANTS' REPLY BRIEF

Respectfully submitted this 25th day of April, 2014

Attorney for Appellants



MICHAEL A. JACOBSON
WSBA No. 13135
119 First Avenue, Suite 200
Seattle, WA 98104
(206) 447-1560
Fax: (206) 447- 1523
mike@mikejacobsonlaw.com

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 APR 28 AM 11:32

Certification of Service. I certify that a true copy of this instrument was delivered this 26th day of April 2014

AAG Marya Colignon
800 Fifth Ave. Suite 2000
Seattle, WA 98104

Original and one copy to:
Clerk, Court of Appeals Division One
600 University St
One Union Square
Seattle, WA 98101-1176



I. TABLE OF CONTENTS

2. TABLE OF AUTHORITIES	1
CASES	1
STATUTES	1
REGULATIONS	1
5. ARGUMENTS IN REPLY	2
6. CONCLUSION	24

II. TABLE OF AUTHORITIES

State Cases

<u>Engbrecht v. Emp Sec Dep't.</u> 132 Wn. App. 423, 429, 132 P.3d 1099 (2006)	23
<u>State Ex. Rel. Carrol v. Junker,</u> 79 Wn.2d 12, 25-26, 482 P.2d 775 (1971)	7-8, 15, 23
<u>Va. Mason Hosp. Ass'n v. Larson,</u> 9 Wn.2d 284, 307, 114 P.2d 976 (1941)	2
<u>W. Transp. Inc. v. Emp Sec Dept.,</u> 110 Wn. App. 440, 451, 41 P.3d 510 (2002)	8

Washington State Statutes

RCW 34.05.570	10
RCW 34.05.570(3)(f)	2, 6
RCW 34.05.570(i)	17, 19-20
RCW 34.05.570(3)(i)	8, 10, 23
RCW 50.04.100	2
RCW 50.04.320(4)(a)	2
RCW 50.04.320(4)(b)	2-3, 5-6
RCW 50.20.070	18

Regulations

WAC 192-100-050(1)(c)	23
WAC 192-310-190(4)	7

V. ARGUMENTS IN REPLY

A. DISREGARDING AND FAILING TO EXPLAIN THE EVIDENCE BEARING UPON THE PREVIOUSLY- ACCRUED-COMPENSATION RULE; THE COMMISSIONER TRANSMITTED AN INCOMPLETE RECORD TO THE COURT.

The court shall grant relief from an agency adjudicatory order if the agency has not decided all issues requiring resolution. RCW 34.05.570(3)(f). See, Virginia Mason, 9 Wn.2d at 307-08 (“Nor is the court precluded from looking to the commissioner's record for the purpose of, in effect, making additional material findings of fact, where the administrative findings are **incomplete**, and where such additional findings **do not controvert** those conclusive findings of fact made by the administrative agency.”)(emp. added)

Here, the Commissioner disregarded and ignored the evidence, made no findings, and left incomplete the central tenet of the Gibsons’ defense: RCW 50.04.320(4)(b) previously accrued compensation.

(320)(4)(b)Previously accrued compensation...when assigned to specific period of time by virtue of a request of the individual compensated, shall be considered remuneration' for the period to which it is assigned.

The Gibsons provided the corporation’s tangible record of an agreed corporate debt for previously accrued compensation accumulated during

¹ RCW 50.04 provides:
(100)Employment.....means (i)personal service...(ii) **performed for** (iii)wages
(320)(4)(a) Remuneration means all compensation **paid for** personal services
(emphasis added.)

the interval 2003 to 2006 [CP 736] and discharged by payments in the interval 2009 to 2011. [CP 736 (CP 737-741)] Michael Gibson (“Michael”) reported to ESD the accrual and discharge of a debt for old or past due wages during the audit period and in his notice of appeal [CP 339-340, 362, 281] and in his hearing testimony. [CP 281, 282] Melody Gibson (“Melody”) reported to ESD the accrual and discharge of this deferred compensation debt. [CP 269-270, 132,133] Melody identified the existence of the bookkeeping reconciliation schedule in her initial report to ESD, and Payroll Administrator Kathy Bennett as its custodian, when ESD first contacted her about this debt. [CP 2611, 2643]

ESD contends that the Court may not **controvert** or override the Commissioner’s evidentiary finding **negating** previously accrued compensation even if reasonable minds could differ. [Brief of Respondent Employment Security Department, p. 20] (hereafter “ESD Brf. p. 20”) But ESD cannot point out to the Court a Commissioner’s finding explaining or debunking or controverting the existence of an accrued corporate debt for **previously accrued** compensation during a **pre-claim-interval** of work. Nor is the statutory authorization to receive RCW 50.04.320(4)(b) previously accrued compensation and preserve entitlement to benefits identified by the Commissioner as a legal issue for resolution. ESD argued that the Commissioner found that **claims-period work intervals** when **paid less** than agreed salary cannot render the Gibsons

unemployed under the Act, [CP 650, FF 18] [CP 1101, FF 18] [ESD Brf. p. 20] -- no matter what euphemism or misleading descriptor the Gibsons asserted. [Id., FF 18] But the Commissioner's discussion of an underpaid work interval during the claims period begs the Gibsons' main questions--

(A) Was there underpaid salary during **pre-claims-interval** work periods?

(B) Was there a **corporate agreement** to accrue the underpaid amounts and carry them on the books of the corporation as a debt owed to the Gibsons to be discharged in future periods?

Wholly ignored, unexplained, disregarded, and uncontroverted by the Commissioner was all the material evidence of the corporation's agreed accrual and discharge of a debt owed to the Gibsons accumulated during the 2003-2006, 2008 intervals:

1. Reported openly on the corporation's accrual and reconciliation reports [CP 736] maintained by bookkeeper Bennett [CP 2611]
2. Reported openly by an independent auditor on the corporation's audited books of account [CP 1092]
3. Affirmed openly in the corporation's Board minutes [CP 729, 732]
4. Reported directly to the ESD tax authorities by the corporation's payroll administrators in quarterly tax reports. [CP 747, 752--"Old wag(es).."] [CP 765, 767, 768--"prior wages...No hours were worked..."]
5. Explained in detail in the hearing testimony of the corporation's CPA defining the IRS look-back period regulations [CP 213] and key employee regulations [CP 183]²

2

"...to make a determination of whether they received unemployment benefits illegally (inaudible) (e.g. "form") 990s is not really accurate. It is not really a way to determine it because, again, the 990s (inaudible)(e.g. "follow") the IRS regulations." [CP 183]

coinciding with the Gibsons' receiving payment to discharge an accumulated debt. [CP 213]

Also unexplained and ignored, the ESD's Designated Spokesperson Gibb admitted in her testimony the mechanism under the Act which preserves a claimant's status as unemployed while in receipt of RCW 50.04.320(4)(b) previously accrued compensation.

Q: Are wages **earned** when the check is delivered to the employee or when the service is given by the employee?

A: (Gibb) When the service is... [CP 139]

...

Q: My employer...paid an amount that was withheld in 2011 when service was performed and they pay it to me in 2012. There is no current earnings to me then is there?

A: If there is no work being done, correct, there wouldn't be. ... [CP 140]

Q: The wages are received during a period where there is no service performed, that's not work?

A: If there is no services, no. [CP 141][See CP 257-258]³

Ms. Gibb's division delivered this same advisory to the corporation in 2009: "Under Washington State Law, wages are considered earned wages in the week the work is performed regardless when the Claimant is paid." [CP 258] Nonetheless, the Commissioner ignored without comment or

For example, the designation "key employee...Michael Gibson" was made erroneously

Q: (Judge Fager)... I just want to clarify then. With regards to the identity of Mike Gibson as a key employee on the form 990, is that correct or is that a mistake?

A: (Eller)...I did it erroneously. Theoretically it should be amended. He is not a key employee. [CP 213][See CP 211] for a discussion of the six-figure income threshold required by IRS regulations.

3

ESD auditor Gibb also admitted that she inferred that if the corporate quarterly [i.e 13 week or 65 work-day] tax reports assert pay for "1 hour" of work for that interval there was "1 hour" of current service provided to the corporation. [CP 238]

explanation each third party, unrelated, independent corporate record keeper, the pre-audit contemporaneous records made by each, the admissions of ESD spokesperson Gibb, the aggregate of them, and the legal issues surrounding RCW 50.04.320(4)(b) previously accrued compensation. RCW 34.05.570(3)(f) requires that the Commissioner's materially incomplete decision must be modified or vacated. The very least the Court should do is to vacate the Commissioner's order and remand with instructions to determine whether the facts establish a previously accrued corporate debt accumulated during a pre-claims interval and whether RCW 50.04.320(4)(b) governs the Gibsons' receipt of claims-period payments discharging that debt.

It is no wonder the Commissioner left the issues unexplained on this record, given the admission of ESD auditor Gibb:

Q: And past due wages, that's... a classification that is—that is covered under the backpay rules, not the wage rules, isn't it?

A: (Gibb) I think we would need to define it and **I'm not able to define** if it was backpay. [CP 141][emp added]

Even though admittedly supplied the data from Branshaw and Bennett and Eller and Ward during the claims audit, ESD auditor Gibb further conceded she posed no question to any of the third party record keepers. [CP 269]⁴ Thus, the Gibsons' central theory of defense was undefined by

4

Having failed to examine or consider or investigate the assertions of independent fiduciary board member Ward and bookkeeper Bennett and CPA Eller, Ms. Gibb reported her unexamined suspicions that the third party records was "something that they

ESD and ignored by the Commissioner. For this added reason, the Court should vacate the decision and remand with instructions to determine the material facts.

A concern for “open floodgates” wrongly draining the ESD trust fund does not arise from an appellate decision directing the Commissioner to consider the impact of previously accrued compensation upon corporate founders whose companies discharge a debt for previously accrued compensation during the claims period. First, there is no flood of benefits poised to pour from the ESD tax collections into the hands of corporate managers. The Legislature has disqualified the corporate owners of **undissolved for-profit corporations** from being paid unemployment benefits. WAC 192-310-190(4) Only non-profit-sector managers like the Gibsons can even claim benefits from a going concern. Second, a ruling in this case would stand for the fact-specific proposition that where independent fiduciary CPAs and bookkeepers and disinterested Directors step forward to record openly in the books and records of the corporation and in its ESD tax reports the discharge of a debt for previously accrued compensation, that repayment will not render a claimant employed. There

(Gibsons) came up with to pay themselves continuously.” [CP 231] “...(D)iscretion is a composite of many things, among which are conclusions drawn from **objective** criteria.” State ex rel Carrol v Junker, 79 Wn.2d 12, 26 (1971). An investigator’s unexamined, subjective suspicion of fraudulent collusion and licensing violations by third party fiduciaries does not acquire an **objective** anchor in the record without a supporting investigative record. Gibb’s unexamined suspicions are neither substantial nor grounded in objective data.

is no slippery slope in so fact-specific a situation. Finally, even if benefits while receiving previously accrued compensation were a slippery slope, it is the Legislature's job to study and anchor it. It is not the job of an appellate court to invalidate regulatory standards based on the narrow perspective gained from adjudicating one person's conflict. For this added reason, the Commissioner's Order should be vacated and remanded.

B. ABDICATING DISCRETION AND FAILING TO EXPLAIN OR CONSIDER FACTS CONTROVERTING THE GIBSONS' STATUS AS REGULAR EMPLOYEES WITH 40- HOUR WORK SCHEDULES (FF 10), THE COMMISSIONER ABUSED HIS DISCRETION.

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria. State ex rel Carrol v. Junker 79 Wn.2d 12, 26 (1971) (publicizing mental health files without notice to affected parties is abuse); See, W Ports Transp Inc. 110 Wn. App. at 450 ("willfully unreasonable without consideration of and in disregard of facts and circumstances.") See, RCW 34.05.570(3)(i) (arbitrary and capricious adjudicatory decisions are reversible) Here, the Commissioner's fact findings abused his discretion, substituting lay definitions for IRS regulatory terms so as to strip the context and objective meaning from the Operation Lookout ("OL") Form 990 income tax records.

The ESD brief identified the evidentiary support for Commissioner Finding 10 ("**FF 10**") [CP 650, 1100] [ESD Brf. p.15] to

be an excerpt from Form 990 section VII, which named Melody Gibson (“Melody”) and Michael Gibson (“Michael”) as corporate “officers” with “average work week–40 hours” and W-2 wages during the claims period [e.g. CP 1056] just the same as in 2008, [CP 991] before layoff. But the indicated snippet from Form 990 intended to answer a wholly different question. First, the snippet is fully contradicted by words printed immediately above it in part VII of the tax form:

XX Check this box if **neither** the corporation nor any related organization **compensated** any **current officer, director, or trustee**. [CP 1056] (emp added).

CPA Eller [CP 1049], the maker of this 2010 record, testified that **neither** Melody nor Mike were identified to be **current** corporate officers because both had been laid off by the corporation in the year covered by the tax form. [CP 181]⁵ CPA Eller testified that IRS regulations required him to list in this section of the tax form every person paid W-2 compensation and designated “officer” during a five-year look-back period. [CP 212]⁶ Each claimant was listed in Part VII of the 2009 and

5

Q: Would it be accurate to say that the term executive director and the head of case management that are listed here in 2010 are referring to individuals who were laid off by the organization?

A: Yes....[CP 181]

6

Q: Could you explain why he (Mike Gibson) is listed among the control group on page 7 of the form 990?

A: Yeah...on page-page 22 of the instructions, okay, there is basically a short blurb about you have to list–if somebody is receiving compensation....there is a five year look-back period....anything going back five years, then I list them as a former employee as

2010 990 tax form because he or she had been compensated for 40 hours per week of officer duties within 5 years of filing the tax form. [CP 212]⁷ The tax form does not furnish space to differentiate current from back pay [CP 172], nor answer the question of current service exchanged for pay. [CP 183] The reported wage on the 2009 and 2010 Form 990 is the “...amount that is reported (which) comes from the W-2s...whether they are paid for current wages or back wages or whatever...” [CP 183] “...past wages...coincide with the IRS rules.” on look-back reporting. [CP 213][see also CP 1092] Stripping from the 2009 and 2010 “average hours per week” report the explanatory sentence immediately above those words, and the regulatory terms of art which defined those words, on a matter which directly contradicted Finding 10; without asserting a reason or basis for doing so, the Commissioner abused his discretion. RCW 34.05.570(3)(i) ESD contends that the Commissioner may be affirmed even where reasonable minds could differ. But RCW 34.05.570 arbitrary conduct is not excused. The Commissioner was not authorized to abdicate his discretion and ignore the material facts directly controverting Finding 10, without offering the Court an explanation or basis that allows the

receiving wages. [CP 212]

7

Q: ...would that be the correct designation for Mike Gibson—former employee receiving wages during a five year look-back period?

A: Correct. [CP 212]

Court to review such discretionary exercise. This abuse is particularly egregious because the evidentiary record otherwise contradicts a 40 hour work schedule during the claims year 2010. The decision must accordingly be vacated for abuse.

The “average work week: 40 hours” during 2009 and 2010 was further contradicted by the OL ESD tax forms filed by Branshaw bookkeeping and Bennett bookkeeping. Each filed and paid the OL ESD tax throughout the claims period and recorded Michael’s and Melody’s **“hours worked: 1 (one)”** during each 13-week tax interval.⁸ [CP 765,766,771,772, 770, 869, 960, 767, 768, 961]. Periodically, the bookkeepers added the notation “no hours worked” to explain why the online report defaulted to 1 hour. [CP 765, 767, 768] Even ESD Auditor Gibb admitted that if there is no service given, there is no work. [CP 141] Gibb further admitted that a wage is **earned** when service is given. [CP 139] And Gibb testified that she inferred from the ESD tax reports that Michael and Melody each worked **one hour** during each of fourteen 13-week (65 day) quarterly tax intervals from October 2008 to March 2012.

8

Melody’s claim period during this interval lasted through the fourth quarter of 2009 [“Q4, 2009” hereafter] and again during Q3 and Q4 2011. During these quarters, the corporation bookkeeping services reported Melody’s “hours worked: 1 (one)” [CP 765,766, 771, 772; 935]

[CP 238]⁹ Yet the Commissioner determined the Gibsons were working and liable for repayment of benefits for every hour of every day of each 65-day quarterly interval encompassed within those 14 tax quarters without regard for or explanation of ESD Auditor Gibb's conflicting interpretation of the evidence. This failure to furnish to the reviewing Court why the ESD Auditor's admissions controverting Finding 10 should be disregarded also abdicated and abused the Commissioner's allowable discretion. The decision must be vacated for this added reason.

The Commissioner disregarded additional material testimony defining the terms used in the 2010 tax form. Eller recalled the 2010 question and answer where he learned Melody and Michael's 2010 "average hours per week" and work status:

Q: Do you know how the figure 40 hours was written down for Melody Gibson's 2010 hours per week under the descriptor Executive Director?

A: ...it would have been(inaudible) conversation

Q:what question did you ask that led her to give you (that)...

A: (inaudible) (e.g. "we did the") 990 ahead of time (inaudible) and we had a conversation that **they** were (inaudible) (e.g. "to") **take layoff** (inaudible)... [CP 179-180] (emp added)

But "0" hours per week and layoff status for Michael and Melody did not get printed on the 2010 tax form, because the form which Eller signed

was past history--a computer generated "pro-forma..."¹⁰ (composed of) data carried forward year to year (unless)...I go in and change it."¹¹ [CP 186]

Michael Gibson's average work week--40 hours as Head of Case Management (with 10 hours of uncompensated board duties) **reported in 2008** [CP 991] simply carried forward onto the 2010 Form 990 report filed with the IRS. [CP 1056] A catastrophic health crisis prevented the CPA from comprehensively undating the tax reports for the year following middle 2009.¹²

Q ...Remember the question you asked (overlapping conversation) (e.g. "which elicited") or that number of hours (on Form 990)?
A: (Eller) Let me just interrupt. (inaudible) Part of 2009, I had a major heart attack (inaudible) where I almost died. I was in and

10

Q: Now, is it possible that the designation Melody Gibson, executive director, 40 hours a week. Mike Gibson, head of case management, 40 average hours a week, which appears on page 7 of the 2008 (Form) 990 and page 7 of the 2009 990...2010... is it possible that that designation was just simply carried forward year to year by you when you (inaudible)(e.g. "were incapacitated")?

A:...that is actually very possible...very much so. (Inaudible) because my computer system--what we do is what we call pro forma which (inaudible) certain data carries forward from year to year...(inaudible) certain default questions, certain things are...carried through. The only time they get changed is (inaudible) (e.g. "if I") go in and change them.

Q: Are you saying that a computer just updates the next year's form with the same information from the prior year...?

A: Correct.... Entries like (inaudible). [CP 186-187]

11

The data source for 2010 reportable wage was the **current year** forms W-3 and W-2 [CP 180]

12

Q: This...tax return dated 2008 was signed November 12th, 2009?

A: Right

Q --that's the period ...in critical care?

A: **No.** I was in critical care early in the year, **but I don't (inaudible) (e.g. "remember") the dates. literally the whole year** I was in and out of hospital [CP 185-186]

out of the hospital...eight or nine times..So a lot of the conversations that took place in 2009 (inaudible) (e.g. “did not record”) what was said because a couple times I was in critical care. [CP 184-185]

Abdicating discretion, the Commissioner wilfully ignored without comment material facts from disinterested corporate CPA Eller which materially controverted the Commissioner’s only evidence of a 40 hour work week and cried out for an explanation. This abuse of discretion should be reversed.

ESD contends that material support for Finding 10 [ESD brief at 18-19][See also CP 1103] is found in Auditor Gibb’s assertions that Operation Lookout operated with no clear distinction between claimants and the corporation [CP 99]--whose disinterested board members were either incapacitated in a nursing home or vacationing or relocated to another state [CP 222]--leaving the Gibsons solely in charge of corporate records [CP 223]for a corporation answering only to them. [CP 222] Yet Gibbs’ assertion of dominance and unitary control of records is materially contradicted by claims-period records made by Board Secretary Ward, [CP 732, 734] director Kohagen [CP 729], and the Payroll Administrators Branshaw and Bennett. [CP 765,766,771,772, 770, 869, 960, 767, 768, 961] [See, CP 765, 767,768-- “no hours worked”] Bookkeeper Bennett’s written reconciliation schedule [CP 736] and CPA Eller’s financial audit notes. [CP 1092] Moreover, Gibb admitted reading **and ignoring** these

independent third party reports:

Q: (Mr. Jacobson)A simple “yes” or “no” question, Ms Gibb.After reviewing reports form Ms. Bradsahw, Ms. Bennett, the CPA about the financial records of the company...the 990 forms from Mr. Eller, your agency did not phone Mr. Eller, Ms. Bradshaw or Ms. Bennet to determine the financial wherewithal of the company to pay current wages, did you?
A: No.[CP 269]

Without an explanation or rationale for disregarding and ignoring these contemporaneous, third party record-keepers or the agency admissions, the Commissioner acted deliberately to disregard facts that clearly needed explaining.

Also, Gibb’s purported illustrations of the Gibsons’ dominance or corporate control are each without an objective basis in fact or experience. An allowable exercise of discretion requires “conclusions drawn from objective criteria.”Junker 79 Wn.2d at 26. ALJ Fager was the information source for Gibb’s testimony, asserting the corporation and claimants were one and the same.

Q: (Judge Fager) ...Michael Gibson and Melody Gibson and Operation Lookout are essentially all one and the same....those two claimants have this business, Operation Lookout; is that correct?
OBJECTION (Jacobson) Argumentative. Leading.
A: (Gibb)There is not a clear distinction between that, no.[CP 110]

Judge Fager was a stranger to the organization, with no objective experience to offer when she put the words in Auditor Gibb’s mouth.

ESD claimed that Auditor Gibb recorded Melody Gibson’s admission that each **OL disinterested board member** was either

incapacitated in a nursing home or vacationing or relocated out of state so as to leave Melody solely in charge of Operation Lookout corporate records. [CP 221] But Auditor Gibb had invented phantom facts, with no anchor in the objective record. Gibb is fully contradicted by her own notes:

Claimant Melody Gibson...1/11/12.

Nxt2Nu Thrift store: works as general manager...board member. ...Asked who runs daily operations of the store-who handles duties who would I talk to....She is the one who knows the most about the store. Other board members—**Lorna Brace is currently in nursing home. Chaplain Constance Echols is currently on vacation. Roxanne Knowlton lives in California...**[CP 2642] (emp added)

Incapacitated or vacationing or absentee directors Brace and Echols and Knowlton had nothing whatsoever to do with Operation Lookout. They are board members identified in a 2010 Form 990 tax report for **Caring for our Children Foundation** (“CFOC”) [CP 895], an organization **unaffiliated** with OL [CP 293] which paid 2010 ESD taxes for work performed by Melody [CP 785-788] ¹³ Kohagen and Borella and Ward served on OL’s board for 2008 [CP 991]; Taylor and Ward furnished board service continuing into 2010. [CP 732]There is no objective basis in the evidence to give credence to Ms. Gibb’s claim that OL’s disinterested directors went AWOL.

Nor is there support for the claim of “manipulation” [ESD Brf. p. 21] or domination of these 2008-2010 disinterested OL board members

¹³ Melody’s claims period **excluded** 2010.[CP 1100 FF8]

during the claims period. Saliently, Gibb did not begin her audit or commence her contacts with Melody until **December 2011**, [CP 2642, 363, 364, 434] the final 90 days of the disputed claims period [CP 1100 FF 8; CP 649 FF 8]. By December, 2011, Operation Lookout had traveled three years down the road from the 2008 nationwide bank failures and Great Recession, which had stripped from their 2008 operating budget of \$.771 million [CP 675, 719-21] 75% of revenue, leaving them as of December 2011 with only \$.19 million [CP 675, 719-21] in fiscal 2011 operating revenues. The 2011 year-end OL staff was a skeleton crew composed of only Katherine Oom. [CP 768] Recessionary effects had by then stripped the operation of its customary headcount, requiring the lay off of Case Managers Marvin and Shackelford [CP 2677, 2679] and Cook, [CP 716] as well as staff members Homblette and Haskins and Boyle. [CP 716] Gibb's objective experiences in 2011 establish only that during the final 90 days of the disputed claims period, Directors Melody and Michael were the captains who went down with a foundering ship. For this added RCW 34.05.570(i) abuse of discretion, the Commissioner's decision must be vacated.

C. RELYING ON PHANTOM FACTS THAT THE GIBSONS FAILED TO REPORT VOLUNTEER SERVICE TIME; THE COMMISSIONER ABUSED HIS DISCRETION.

ESD challenged each Gibson's assertion of zero work hours for time spent volunteering. [ESD Brf. p.17] As to each claimant, the

Commissioner found:

At hearing **claimant's attorney argued** that claimant ... was not required to report volunteer hours.

...

At no point in time did claimant ... report she worked as a volunteer.... She never gave the Department the full story and she received benefits as a result.

...The undersigned finds claimant's argument that he was unemployed when "volunteering" ... not logically persuasive.... His argument is clearly motivated by self interest so as to avoid the disqualification pursuant to RCW 50.20.070... [CP 1100, 1101 FF 9, 19][See, CP 649, 650-51, FF 9, FF 18][emp added].

Deception accomplished through unreported volunteer hours is materially contradicted by the admission of Gibb:

Q: (Unemployment Insurance Resource Manual)... Do you use it in order to interpret the rules and give advice or discuss issues with claimants?

A: (Gibb) Yes

...

Q: ...do you recognize that as section 5497 from the resource manual?

A: Yes.

...

Q: I would like you to read the last sentence out loud...

A: "Hours spent doing volunteer work are not reportable."
[CP 137-139][emp. added].

The ESD Auditor's admission, which materially contradicts the Commissioner's findings, begs for some type of explanation why unreported volunteer hours should be regarded as an element of deceit or why the Commissioner would recharacterize a party admission as an argument of counsel. Yet this alleged deceit is a building block upon which the Commissioner explicitly rests his decision to discredit each claimant

for bias and self interest. [CP 651 FF 18; CP 1101 FF 20] This RCW 34.05.570(i) deliberate disregard of and mischaracterization of a party admission is particularly egregious, given its proximity to an essential credibility finding upon which so many ancillary findings hinge. The Order should be vacated for this added reason.

D. “UNEMPLOYMENT” INCONSISTENT WITH AUDITED WAGE AND HOUR RECORDS IS MATERIALLY CONTRADICTED BY ESD’S WITNESS, YET UNEXPLAINED.

ESD contended the corporation’s ESD tax filings undermined each Gibson’s claim to be unemployed. [ESD Brf. p. 14] As to each claimant, the Commissioner found:

The undersigned finds claimant’s argument that she was unemployed when “volunteering” and without earnings when she collected deferred wages not logically persuasive. Such is not consistent with her ultimate report to the Department regarding **wages and hours...**[CP 1101 FF 20] [See also CP 650 FF 18]

This is both a non-sequitur and flat footed false claim. Elsewhere in the record, the Commissioner acknowledged that “Mrs. Gibson identified earnings as deferred earnings” in response to audit queries. [CP 650 FF 13][See CP 2643, 32, 350, 659, 50] Further, the Operation Lookout ESD tax filings made during the interval 2009 to 2011 contradict the Commissioner.[CP 765, 766, 771, 772, 770, 869, 960, 767, 768, 961] [See, CP 765, 767,768-- “no hours worked”] Yet the material contradictions to Finding 18 supplied by his own Finding 13 and the tax reports were disregarded and unexplained by the Commissioner as if non-

existent, in violation of RCW 34.05.570(i). The Commissioner's Order must be vacated for this additional reason.

E. A CLICK-THE-BOX YES-OR-NO CLAIM FORM WHICH ASKS ABOUT "OTHER EARNINGS" IN THE CURRENT WEEK EXCLUDES CONSIDERATION OF PREVIOUSLY ACCRUED COMPENSATION.

ESD claimed each Gibson's appeal was undermined because each earned W-2 wages while checking a box on the claim form asserting no other earnings that period. [ESD Brf. p. 15] ESD contends that "other earnings" printed on the weekly claim form should have tipped the Gibsons to check "yes" even if their service hours had occurred years before. [ESD Brf. p. 15][See, CP 1117¶2; CP 1108 ¶2— "no work and no earnings...was clearly false"] The question posed on the claim form rules out an inquiry into previously accrued compensation. The question asks about pay for service in the current week.

Q: For **(this current)** week: other earnings? [yes or no]
[CP 469-591][emp added]

There is no basis here to infer that ESD demanded disclosure of a 2006 debt payment by posing the question: "[this] week....earnings- yes or no." Also, the ESD step-by- step instructions [CP 609] furnished illustrations of "other earnings" including holiday pay **this week**, pay in lieu of notice or termination pay **this week**, military reservist pay, profits from self employment, or work for any employer this week. [CP 615-21] There is no basis to believe from the question posed or this list of illustrations that the

answer sought about “other earnings” was “ non-earnings.”¹⁴ ESD’s own witness contradicts the ESD position taken on appeal. Auditor Gibb admitted: “if there is no work being done...there wouldn’t be” **earnings** [CP 140] and there wouldn’t be **work** [CP 141] (emp. added) Material ESD admissions which controvert the findings cannot be explained by the Commissioner’s distrust for the Gibsons. Yet the Commissioner ignored the material ESD admissions that endorse the Gibsons’ answers on the click-the-box claim forms; The Commissioner’s Order was arbitrary for this added reason.

F. SAME TITLE IS NOT SAME DUTIES.

ESD claimed each claimant’s appeal was undermined because each admittedly performed the same duties whether filing claims or fully employed. [ESD Brf. p. 16] The Commissioner found those to be the facts:

The work Mr. Gibson performed as an employee, board member, case manager, and computer technician ...throughout the years has not changed significantly...such was the same for claimant (Melody) [CP 1101 FF 16]

Michael Gibson’s testimony directly contradicted this finding. After layoff, Michael’s Head of Case management Duties were “rescinded.” [CP

14

ESD Auditor Gibb gave **immaterial** testimony that if the Gibsons had clicked “yes” where the form lists “ other earnings” this period, the online form would have prompted them to answer a host of additional questions. [CP 113-14]. But here Gibb begged the disputed question: Would the ESD online form have contradicted the primary question so as to ask: “did you get pay this week for work done years ago” or “were you paid for a debt accrued years ago”? Non-earnings was not in the frame.

283] When the layoff ended in middle 2012 and Michael was restored to regular work, he handled more responsibilities. [CP 285] Those included training staff, overseeing and involving himself in the tactics of the mission, [CP 287-88] performing “hands on” case work, and taking on a supervisory role for other staff. [CP 289] This is a substantial difference from his volunteer duties for the Board. In his continuing role as Director, Michael developed policies and procedures, oversaw hiring, and served in a ceremonial role as 501(c)(3) Spokesman. [CP 284] He spent possibly 2-3 hours in a typical day on site handling these Director duties [CP 289] or an incidental request to help un-jam a computer. Michael did so whether laid off or fully employed--Tax Form 990 identified Michael to be Board President furnishing an average 10 hours per week of uncompensated service both in 2008, before the claims period, [CP 991] and in 2010. [CP 1056] Melody’s unpaid Board service was likewise reported to continue both before the claims period and after. [Id.] The only thing unchanged for Michael was “I don’t know that my title ever changed.... head of case management.” [CP 282]

Melody’s supposed unchanged work for OL is both a fiction and besides the point. Melody was paid wages by Caring for Our Children Foundation throughout 2010 and 2011 and did not even claim ESD benefits during the 18 month interval January 2010 to June 2011. [CP 1100 FF 8] She furnished one work hour to Operation Lookout according

to the 3rd quarter and 4th quarter tax filings in 2011. The Commissioner disregarded and reversed this clear demarcation between unpaid service as a Director and paid service as an Executive without explanation or stating a rationale for it. For this added reason, the Order should be vacated.

G. FRAUD MUST BE VACATED.

A fraud finding requires deliberate falsity or knowing indifference to the truth. Engbrecht v DES, 132 Wn. App. at 429 (a claimant “cannot defeat recovery by showing that he did not know his representations were false, or that he believed them to be true.”); See, WAC 192-100-050(1)(c) (“that the individual ...**did not know whether** it was true or false when making it.”) ¹⁵ This conclusion, as others, must be drawn from objective criteria. Junker, 79 Wn.2d at 25; See, RCW 34.05.570(3)(i). Even if the Court were to agree that the Gibsons answered incorrectly by omitting to disclose deferred pay when asked to click-the-box that says “yes... other earnings...(this) week” [ESD Brf. p. 25], the Commissioner had ignored without explanation ESD’s direct 2009 communication to Michael’s and Melody’s employer that wages are earned when the work is given, not when the check is given [CP 258] and that if there is no current service there are no earnings and there is no work. [CP 139, 141] Indifference to

15

“Working full time” [See, CP 652 CL 8] [See CP 1103 CL 8] was an abuse of discretion for the reasons set forth in section B. During the claims period, “performing similar service” as when employed [Id.] was an abuse of discretion for the reason set forth in section F.

the truth cannot be illustrated, where claimants rely upon official agency assertions of what “Washington State Law” provides. [CP 258] For these reasons, the adjudicated fraud must be vacated.

VI. CONCLUSION. The Commissioner’s failure to make any findings up or down concerning the central disputed issue of previously accrued compensation to discharge an old debt obligation requires that the Court vacate the Order. The Commissioner’s abdication of discretion or abuse of his discretion in disregard of and without explanation of a wide swath of material contradictions in the record must be vacated. The very least the Court can do is to remand to the Commissioner with instructions to attend to and resolve unaccounted-for material facts about an unstated legal issue. Because the Court must alter the status quo between the parties, an award to the Gibsons is a necessity, reimbursing their reasonable counsel fees.